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Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1231 & 73-1234

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
AND
TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRUCK DRIVERS UNION LOCAL NO. 413, AND TEXTILE WORKERS UNION,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNION RESPONDENTS

The opinions below, the basis of this Court's jurisdiction, and the statutory provisions involved are set out at pp. 2-3, of the brief for the petitioner in No. 73-1231 (Linden Lumber Division, Summer & Co.), and at pp. 1-4, of the brief for the petitioner in No. 73-1234 (the National Labor Relations Board).[1]

[1] Since they raised the same question in essentially parallel settings, the Court of Appeals consolidated two petitions for review of

QUESTION PRESENTED

Sections 8(a)(5) & 9(a) of the National Labor Relations Act provide that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representative * * * designated or selected * * * by the majority of the employees in a[n] * * * appropriate * * * unit." The question before this Court is:

Whether an employer who does not commit substantial violations of §§ 8(a)(1)-(4) has an absolute privilege to reject a request for bargaining made by a union that offers to prove that it has been "designated or selected" by a "majority" through a method other than petitioning for and securing a Board certification.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

The question of statutory construction presented by these cases is distinctive in that it is of exceedingly narrow compass, and, that it has been squarely answered by Congress.

In 1972 (37 years after §§ 8(a)(5) & 9(a) of the National

separate Board decisions, one filed by Truck Drivers Union Local No. 413 and involving Linden Lumber Division, the other filed by the Textile Workers Union and involving the Wilder Mfg. Co. (NLRB Pet. App. p. 24.) Both petitioners seek reversal of the resulting decision of the court below. We therefore respond to both in this brief.

[2] Since, as we show below, the Court of Appeals did not determine when an employer must bargain with a union that has not petitioned for and secured a Board certification, but simply held that the privilege not to do so is not absolute, the question presented here is wholly abstract. For this reason and since the Board's

Labor Relations Act[3] were enacted in precisely their present form), the National Labor Relations Board, in the decisions under review,[4] and after a series of vacillations,[5] squarely adopted its "'voluntarist' view of the duty to bargain," *viz*, that "absent unfair labor practices or an agreement to determine majority status through means other than an election, such as a poll, the employer has no duty to recognize the union," (NLRB Pet. App. p. 35). In other words, the Board's current position is that an employer who does not commit substantial violations of §§ 8(a)(1)-(4) has an absolute privilege to reject a request for bargaining made by a union that offers to prove that it has been "designated or selected" by a "majority" (§§ 8(a)(5) & 9(a)) through a method other than petition-

statement of the case (Bd. Br. pp. 5-11) follows the outline of the facts as stated in its decisions (which the Unions accepted in the court below), we do not restate the case.

[3] Section 8(a)(5) of the Act, provides:

> "It shall be an unfair labor practice for an employer * * * to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Section 9(a), in turn, states:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *"

[4] *Linden Lumber Co. & Truck Drivers Local No. 413* (NLRB Pet. App. pp. 51-118), and *Wilder Mfg. Co. & Textile Workers Union of America (Second Supplemental Decision)* (NLRB Pet. App. pp. 178-193).

[5] See NLRB Pet. App. pp. 25-35 detailing the tortuous history of the *Wilder* litigation.

ing for and securing a Board certification.[6]

Logically, the issue presented to the Board by the §8(a)(5) charges filed by the Unions has two components: Does an employer who has not committed other unfair labor practices ever have an obligation to bargain with a union that has not secured a Board certification? If there is such an obligation, under what circumstances does it attach? The Board answered the threshold question in the negative by ruling that the employer has an absolute privilege to refuse to bargain, and therefore did not treat with the second, and ultimate, question. (Nevertheless the Board seeks to prejudice consideration of the adequacy of its answer to the first question by urging that it is not possible to provide a rational answer to that latter question. (Bd. Br. pp. 20-22.) But see *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 198, rejecting a similar Board argument, discussed at pp. 44 *infra*.)

On petitions to review, the Court of Appeals held that the Act does not provide employers the absolute privilege the Board would grant them. (NLRB Pet. App. p. 50.) That court, however, did not enter bargaining orders directed to the Employers, nor did it require the Board to do so; instead, these cases were "remand[ed] to the Board to reconsider what options consistent with the statute it wishes to follow," (NLRB Pet. App. p. 50). The petition for certiorari by the Board and Linden Lumber followed. Thus, the issue before this Court, is whether, as the Board claims, its "'voluntarist' view of the duty to bargain" is correct, or whether as the Court of Appeals held, that view "is inconsistent with the Act," (Pet. App. p. 50).

[6] For simplicity's sake we shall on occasion refer to the Board's present practice as its "absolute privilege" position, or its "'voluntarist' view of the duty to bargain," with the understanding that those short-hand terms have the meaning stated in the text.

In the body of the argument we demonstrate first that it was settled prior to 1947 that employers do not have an absolute privilege to reject a request for bargaining by a union that has not petitioned for and secured a Board certification (pp. 5-15); second, that the 1947 Congress in enacting the Taft-Hartley amendments to the Wagner Act, after considering whether to grant that privilege, chose instead to maintain the preexisting law (pp. 15-25); and third, that this Court's post-1947 decisions in *Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62 (which the petitioners ignore even though it is very much in point) and *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (upon which they erroneously rely) respect the judgment of the 1947 Congress to ratify the Wagner Act law as to the obligation of an employer to recognize a union "designated or selected" by a "majority" (§§8(a)(5) & 9(a)) (pp. 25-45). In other words, we show that the question here is, not, as the Board claims, one which "Congress has in the statute given the Board to answer." (Cf. Bd. Br. pp. 25-26 n. 29 citing *Labor Board* v. *Insurance Agents International*, 361 U.S. 477, 489.) For, Congress itself has squarely answered that question so as to preclude adoption of the Board's "absolute privilege" position. Accordingly, here, as in *Insurance Agents* the Board's "answer" is not entitled to "respect" from this Court. "Congress' * * * policy cannot be de-

feated by the Board's policy." (*Local 1424 Machinists* v. *Labor Board*, 362 U.S. 411, 428.)

ARGUMENT

1. In 1935 Congress declared "the policy of the United States" to be "encourag[ement of] the practice and procedure of collective bargaining." To further this policy, § 7 guaranteed employees "the right • • • to bargain collectively through representatives of their own choosing." Sections 8(5) & 9(a), in turn, imposed on employers the duty which effectuated this employee right; they declared it to be an unfair labor practice "to refuse to bargain collectively with the representative • • • designated or selected • • • by the majority of the employees in a[n] • • • appropriate • • • unit."[7] Since Congress had not:

> "specif[ied] precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented 'convincing evidence of majority support.' Almost from inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation." (*NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 598; footnote omitted.)

The original understanding (cf. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315) was succinctly stated by Judge Charles Clark in the leading case of *NLRB* v. *Dahlstrom Metallic Door Co.*, 112 F.2d 756, 757 (C.A.2):

[7] In 1947, Congress, while retaining the language of §§ 8(5) & 9(a) *in haec verba*, changed the designation of § 8(5) to § 8(a)(5).

> "The contention that bargaining was not mandatory until the Board had accredited Local 307 as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support. National Labor Relations Board v. Remington Rand, Inc., 2 Cir., 94 F.2d 862, 868, certiorari denied 304 U.S. 575, 585. We do not mean that respondent had to bargain with anyone claiming to represent a majority, but adequate proof tendered by the claimant could not in good faith be ignored."

See also, e.g., *Burnside Steel Foundry Co.*, 7 NLRB 714, 715:

> "The [Union] attempted in good faith to convince the [Employer] that it represented a majority of the employees. Its proposal [that its membership cards be checked against the pay roll] was apparently a fair, practicable, and not unduly burdensome method of substantiating its contention. The [Employer's] officials simply rejected it, making no counterproposal other than that the [Union] obtain the Board's certification. • • • [T]hey indicated no respect in which they considered the method proposed • • • unsatisfactory. In the circumstances • • • the Employer's duty to bargain collectively with the [Union] included the duty to cooperate with the [Union] to a reasonable extent, in an inquiry as to that organization's claim to have been designated as exclusive bargaining representative."

Indeed, prior to 1947 the Board had made it plain that even where the employer does indicate "a respect in which [he] consider[s] the [union's proof] unsatisfactory," he may not rest on the "counterproposal • • • that the [union] obtain the Board's certification." (Cf. *Burnside*, *supra*).

Where that is the situation the employer has an affirmative obligation to come forward with a "reasonable proposal" which would "facilitate a speedy resolution of [his] doubts" and would not "delay collective bargaining." (*Roanoke Public Warehouse*, 72 NLRB 1281, 1282)[8]

---

[8] While the *Roanoke* Board found no § 8(5) violation on the ground that in that case (as contrasted to these) the employer did fulfill that affirmative obligation, it took pains to reject the "absolute privilege" position the present Board argues for here:

> "On this particular record, the employer's scepticism as to whether the proffered membership cards reflected the desires of a majority of his employees is insufficient evidence of bad faith upon which to found a finding of refusal to bargain. He agreed to be bound by the results of an expedited *consent* election.
>
> • • • •
>
> "The conclusion reached on the particular facts in this case should not be construed to mean that an employer may always demand an election or certification when faced with a demand for bargaining rights by a representative claiming to represent a majority of his employees • • •. The obligation imposed by the Act is to bargain with the representative of a majority of the employees. If the majority is present, the obligation exists, subject to the possibility that a particular employer may, in good faith, ask for reasonable proof of the representative's asserted majority status." (*Id.* at 1282 & n. 3; emphasis in original)

Where a union must petition for certification the full panoply of procedures available to the employer is an initial hearing, the election, the filing of and decision upon objections, an appeal to the Board, a refusal to bargain to test the certification, an unfair labor practice hearing, another appeal to the Board, and an appeal to the courts. As the Board itself has recognized, in that context an employer may therefore secure "delay of 2 or more years in the fulfillment of a statutory bargaining obligation." (*Ex-Cell-O Corp.*, 185 NLRB 107, 108.) In contrast, a consent election agreement dispenses with the need for an initial hearing and provides a substantial safeguard against dilatory tactics by providing that the decision of the Board's Regional Director, who conducts the election, shall be "final." (See 29 C.F.R. § 102.62.)

To be sure, as this Court added in *Gissel*, 395 U.S. at 597 n. 11:

> "The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, even if in fact the Union did represent a majority, was [also] recognized early in the administration of the Act, see NLRB v. Remington Rand, Inc., 94 F.2d 862, 868, (CA 2d Cir.), cert. denied, 304 U.S. 576."

But that is of no aid to the Board here. For, as Judge Learned Hand stated in *Remington Rand*, 94 F.2d at 868-869:

> "The [employer] answers [a refusal to recognize

The Court of Appeals noted:

> "Board member Fanning, dissenting, in the Second Supplemental Decision in *Wilder*, observed that:
>
> '[O]ur experience in conducting elections demonstrates that where employers are willing to go to an election, the election is held more expeditiously and with far less likelihood of interference in the conduct of the election than is the case where either party has to be forced to an election.'
>
> "One commentator, on the basis of an interview with Martin Schneid, Assistant to the Regional Director, NLRB, has concluded that 'an election contested through submission of objections at a pre-election hearing is likely to take sixty to sixty-three days between petition and balloting, while a consent election, in which the hearing is waived, is likely to take only twenty to twenty-three days.' Comment, [39 U. Chi. L. Rev.] at 325 n. 48." (NLRB Pet. App. p. 48, n. 48)

> charges by asserting] that it had no official or conclusive information that the Joint Board was the duly accredited bargaining representative of the men, and that it could not have had until the Labor Board had itself so decided. The Labor Board does indeed have that power, section 9(c), 29 U.S.C.A. § 159(c), and when there is a real doubt, we may assume arguendo that the employer need not decide the issue at his peril; * * *. If he cannot satisfy himself of their credentials, and if he cannot by informal appeal to the Labor Board invoke its power, it would certainly seem that he should be free not to recognize; * * * but from that immunity it does not in the least follow that [the employer] need be satisfied with no evidence except the Board's certificate; it may be entirely apparent from other sources that [the union seeking recognition] really represents the majority * * *. [Where an employer makes] no effort to learn the facts [he takes] the chance of what they may be."

In sum, as of 1947, it was settled that §§ 8(5) & 9(a) impose on an employer who receives a request to bargain from a union that claims majority status and offers to substantiate its claim by a method other than petitioning for a Board certification, the obligation "to learn the facts" (*Remington Rand, supra*), through a method that "facilitate[s] a speedy resolution of [his] doubts" (*Roanoke Public Warehouse, supra*), and to bargain if the union is able to substantiate its claim through "convincing evidence of majority support" (*Dahlstrom Metallic Door, supra*); the employer does not have the privilege of responding by requiring "that the [union] obtain the Board's certification," (*Burnside Steel Foundry Co., supra*). And, the foregoing rule of law applied whether or not the employer

committed other unfair labor practices. For, in both *Dahlstrom Metallic Door* and *Roanoke Public Warehouse* the employer had not violated §§ 8(1)-(4).

Thus, while the Wagner Act precedents speak in terms of a "good faith doubt" test (*Gissel*, 395 U.S. at 597 n. 11), that test was not entirely or even predominately subjective; at its core were the objective requirements just stated. To be sure, as is readily apparent from their language, the pre-1947 cases did not fully flesh out the precise content of the employer's §§ 8(5) & 9(a) obligation. But those precedents were uniform in their appreciation that the Wagner Act did not grant employers an absolute privilege to refuse to bargain unless the union petitions for and secures a Board certification. That is why the affirmation of that law by the 1947 Congress (see pp. 15-25 *infra*) proves that the Board's current "'voluntarist' view of the duty to bargain" is wrong, but does not dispose of the question which the Board's present practice pretermits—the precise circumstances under which the duty to bargain with a union which claims to have been "designated or selected" by a "majority" attaches. (Compare pp. 4-5 *supra*.) Rather, as to the latter question the course of prior events simply establishes that the Board may not give such limited effect to the employer obligation imposed by §§ 8(a)(5) and 9(a) so as to require in practical terms that unions must petition for and secure a Board certification.

The original understanding of what §§ 8(a)(5) & 9(a) are all about takes full account of the 1935 Congress' decision, embodied in § 9(c), to provide a procedure by which

unions may petition for a Board certification, and the Board's decision, in *Cudahy Packing Co.* 13 NLRB 526, to *certify* only a union which has prevailed in a Board-conducted election. Sections 8(a)(5) & 9(a), on their face, make it plain that utilization of that procedure is not mandatory at the whim of employers. For, the "obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace." (*IUE* v. *NLRB*, 426 F.2d 1243, 1249 cert. denied 400 U.S. 950.) Thus, prompt initiation of collective bargaining is necessary to fulfill the ultimate aim of the Act—to "encourage the practice and procedure of collective bargaining" (§ 1). But, as already noted (pp. 8-9 n. 8), union certification petitions are the most time-consuming method for initiating bargaining. And, the passage of time discourages the "practice and procedure of collective bargaining:"

> "Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. • • • Thus the employer may reap [two] benefit[s] from his original refusal to comply with the law • • • an avoidance of bargaining [during the pendency of the case; and] he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively." (*IUE* v. *NLRB*, 426 F.2d at 1249)

That is why Congress imposed upon employers a duty to recognize the union "designated or selected" by the

"majority" (§§ 8(a)(5) & 9(a)), without "specifying precisely how that representative is to be chosen" (*Gissel*, 395 U.S. at 598), and not a duty only to recognize unions that have petitioned for and secured a Board certification. And that is why the Act requires unions to initiate the formal § 9(c) certification procedures as a condition precedent to bargaining only in those cases in which there is a "bona fide dispute as to the existence of the required majority of eligible employees" (*Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 69); *viz*, only where those protracted procedures are necessary to enable the Board to resolve a substantial question as to the employees' desires.

The Board's opinions in these cases do not discuss the pre-1947 law. However, the Board's brief, relying on two Wagner Act cases, takes issue with this Court's summary of that law in *Gissel*, 395 U.S. at 598 (see p. 6 *supra*), arguing:

> "[A]n employer could lawfully refuse to bargain with a union claiming representative status • • • if he had a 'good faith doubt' whether the union represented a majority of the employees in an appropriate unit. A good faith doubt would ordinarily be imputed to the employer if he insisted that the union verify its majority claim in a Board election, and refrained from committing independent unfair labor practices that tended to undermine the union." (Bd. Br. pp. 16-17.)

Neither of the cited cases (Bd. Br. p. 17 n. 14) supports that assertion. We have already discussed *Roanoke Public Warehouse*, 72 NLRB 128 and shown that it is of no aid to the Board here. (P. 8 *supra*.) In *Abinante & Nola Packing Co.*, 26 NLRB 1288, 1322-1323, two unions, one of whom

had previously been recognized, were actively seeking representative status. The Board "dismiss[ed] the allegation of the complaint that the [employers] refused to bargain collectively" since they:

> "were confronted with the fact that a substantial number of employees were shifting their allegiance back and forth between the two labor organizations. We think that in the circumstances of this case they did not act unreasonably in rejecting the suggestion that the question concerning representation be determined on the basis of the designations alone and in insisting that they would not bargain with Local 1-6 unless and until the Board certified that organization." (*Id.* at 1322-1323.)

That holding does not support the assertion in the Board's brief. It is simply an application of the proposition stated in *Dahlstrom Metallic Door*, 112 F.2d at 679, that the employer's duty to bargain is contingent upon production by the union of "convincing evidence of majority support," predicated on the conclusion that card designations are not such evidence where "a substantial number of employees [are] shifting their allegiance back and forth between two labor organizations." Indeed, as noted below (p. 17), throughout the Wagner Act period, the Board recognized the particular problem produced by cases such as *Abinante & Nola Packing Co.*, and distinguished between cases in which two unions were seeking bargaining rights and those in which only one union did so, by granting employers the right to petition for a Board election in the first instance but not the second. The two Wagner Board precedents cited by Linden Lumber (Co. Br. p. 9) in support of its

argument are also beside the point. *Cudahy Packing Co.*, 13 NLRB 526 dealt only with the procedures to be followed after a certification petition has been filed and not with the law as to when unions must secure a certification. (See *Gissel*, 395 U.S. at 598.) And, *Midwest Piping and Supply Co.*, 63 NLRB 1060, like *Abinante & Nola*, was a case in which two unions were vying for representation rights.

2. The established law as to the obligations imposed by §§ 8(5) & 9(a) was ratified in the Taft-Hartley amendments to the Wagner Act. In the Conference to reconcile the House and Senate bills the House receded from its proposal to limit that obligation only to "an employer [who] had failed to bargain with a union 'currently recognized by the employer or certified as such [through an election] under section 9.' Section 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess. (1947)," (*Gissel*, 395 U.S. at 598), in favor of the Senate bill which proposed reenactment of §§ 8(5) & 9(a) without modification. The Conference Committee explained that:

> "The conference agreement * * * follows the provisions of existing law * * * in the case of section 8(5) * * * which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)." (H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess. p. 41, 1 Legislative History of the Labor Management Relations Act (G.P.O., 1948), p. 545.)

We have just seen that in conformity with the plain language of §§ 8(5) & 9(a) the then "existing law" was that an employer does have an obligation to bargain with a

union" designated or selected" by the "majority," and does not have an absolute privilege to delay the prompt initiation of collective bargaining by requiring the union to petition for and secure a Board certification. (Pp. 5-15 *supra.*) It is difficult to conceive of a more direct manifestation of a Congressional intent to continue to impose on employers that substantive obligation and to continue to deny to employers that privilege. (Compare *Labor Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366.) Again, (compare p. 13), the Board opinions in these cases do not notice this authoritative guide to decision. And, the 1947 amendments to which the petitioners point serve only to confirm the lesson we draw from the legislative history.

As Linden Lumber notes (Co. Br. p. 9), the 1947 Congress did amend "§ 9(c) to make elections the sole basis for *certification.*" (*Gissel,* 395 U.S. at 598, emphasis in the original.) The Court has already found without merit the suggestion that a "change was wrought" thereby in the duty to recognize uncertified unions. (*Id.*) That amendment merely approved the practice the Board has adopted in *Cudahy Packing* and followed thereafter. (P. 12 *supra.*) For, a "*certified* union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order and which, Congress could determine, should not be dispensed unless a union has survived the crucible of a secret ballot election." (395 U.S. at 598-599; emphasis added.)

Moreover, neither § (9)(c)(1)(B),[9] nor anything else in

[9] "Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

the 1947 amendments, imposed on unions the obligation to secure a certification simply because the employer refuses to accept alternative proof of majority status. (Cf. Co. Br. pp. 9, 18-19; Bd. Br. pp. 28-29.) What § 9(c)(1)(B) does do is enable an employer who is faced with a demand for recognition to file his own petition for an election (which he was able to do under prior law only where more than one union was seeking recognition, see *Gissel,* 395 U.S. at 599, n. 15).

The court below suggested that § 9(c)(1)(B) could be read as privileging the refusal to bargain of an employer who exercises his right to file a § 9(c)(1)(B) petition. (NLRB Pet. App. pp. 45-49.) But even that suggestion runs counter to the authoritative explanation of the limited purpose of § 9(c)(1)(B):

> "The present Board rules [which allow employers to file election petitions only if there are two unions seeking recognition] discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent the employees are really not the choice of the majority." S. Rep. No. 105, 80th Cong., 1st Sess., 10-11; 1 Leg. Hist. of the LMRA, 416.[10]

• • •

"by an employer, alleging that one or more individuals or labor organizations, have presented to him a claim to be recognized as the representative defined in section 9(a);

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice."

[10] The Board attacks the lower court's "premise" that § 9(c)(1)

Thus, § 9(c)(1)(B) appears to grant an employer who has "*reasonable grounds* for believing that labor organizations claiming to represent the employees are really not the choice of the majority" (*viz.*, an employer who has complied with his obligations under §§ 8(a)(5) & 9(a) with the result that the union claiming to be the representative has not been able to provide him with "convincing evidence of majority support" yet refuses to either renounce its claim or file a certification petition (see pp. 5-15 *supra*)) a practical means for securing prompt resolution of the ensuing substantial representation question; it is not a means by which employers who lack such grounds may escape those obligations."

(B) was intended to enable employers to "test out their doubts as to a union's majority status." (Bd. Br. p. 28). But that premise is nothing but a quotation from this Court's opinion in *Gissel*, 395 U.S. at 599 (and was set off by quotation marks). Moreover, while the Board notes various stratagems whereby an employer who files a petition could frustrate a prompt election (Bd. Br. pp. 28-29), and thereby provides a predicate in addition to the explicit legislative history for our view (contrary to that of the court below) that § 9(c)(1)(B) is of aid only to an employer who has "reasonable grounds" for his refusal to bargain, no answer is provided to the Court of Appeal's suggestion that "[w]hen an employer • • • consents to [an] election, the election process is expedited." (Cf. Bd. Br. p. 28; compare pp. 8-9 n. 8 *supra*.)

[11] The foregoing analysis of § 9(c)(1)(B) is entirely consistent with this Court's opinion in *Gissel* which states:

> "The employers rely finally on the addition to § 9(c) of subparagraph (B), • • • That provision was not added, as the employers assert, to give them an absolute right to an election at any time; rather, it was intended, as the legislative history indicates, to allow them, after being asked to bargain, to test out their doubts as to union's majority in a secret election which they would then presumably not cause to be set aside by illegal anti-union activity. We agree with the Board's assertion here that there is no suggestion that Congress intended § 9(c)(1)(B) to relieve any employer of his § 8(a)(5) bargaining obligation where, without good faith, he engaged in unfair labor practices disruptive of the Board's election machinery. And we agree that the policies reflected in § 9(c)(1)(B) fully support the Board's present administration of the Act • • • for an employer can insist on a secret ballot election, unless, in the words of the Board, he engages 'in contemporaneous unfair labor practices likely to destroy the union majority and seriously impede the election." (395 U.S. at 599-600; footnote omitted.)

But, however, that question is resolved, § 9(c)(1)(B) cannot possibly be read to affect the obligations of an employer, such as those here, who does not utilize that provision but flatly refuses to bargain with a union that has not petitioned for and secured a certification.

Linden Lumber also suggests (Co. Br. p. 9; cf. Bd. Br. p. 24, n. 27) that a Congressional intent to provide employers the absolute privilege the Board would grant is to be divined from the addition of § 8(c) which states:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed,

The fact that § 9(c)(1)(B) "fully supports" the Board's "present administration of the Act" against *employer* attacks based on the premise that they have "an absolute right to an election at any time," does not mean that § 9(c)(1)(B) also "fully supports" that policy against *union* attacks premised on the proposition that it is inconsistent with the Congressional intent to grant employers the limited privilege to "insist on a secret ballot election," only where, to use the language of S. Rep. No. 105, *supra*, they "have reasonable grounds for believing that labor organizations claiming to represent their employees are really not the choice of the majority." Instead the passage from *Gissel* just quoted, when read in its entirety, can only mean that § 9(c)(1)(B)

graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

It is inherently unlikely that Congress would cancel the express obligation retained in §§ 8(a)(5) & 9(a) by so oblique a means. But we need not speculate. This Court has indicated that the "narrow purpose" of § 8(c) is "to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements. See H. R. Rep. No. 510, 80th Cong., 1st Sess. 45 (1947)." (*Linn* v. *Plant Guard Workers*, 383 U.S. 53, 62 n. 5.) In the words of that Conference Report the Board's "practice" § 8(c) disapproved, was the use of "speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law," not the original understanding of §§ 8(5) & 9(a). Thus § 8(c) enacts a rule of evidence not a rule of substantive law requiring the Board to create occasions for speech. (Cf. *Central Hardware Co.* v. *NLRB*, 407 U.S. 539.)[12]

"fully supports" the Board insofar as it holds that an employer presented with authorization cards alone, who commits no unfair labor practices, "can insist on a secret ballot election by filing his own petition." In conformity with the language of S. Rep. No. 105, *supra*, the Court stated that § 9(c)(1)(B) "was intended, as the legislative history indicates, to allow employers * * * to test out their doubts as to union's majority;" it did not state that the provision allows an employer having no "reasonable grounds" for doubt to demand that the union petition for certification.

[12] To round out the legislative picture a word concerning

Thus, looking both to what was accepted and what was rejected in 1947, it is plain: first, that employers sought, and Congress specifically considered granting the absolute privilege to require a union seeking recognition to petition for and secure a Board certification; and second, that Congress concluded that the proper accommodation of the competing interests at stake was to reenact §§ 8(a)(5) & 9(a) (which in express statutory terms, and as construed, impose on employer an obligation to bargain with the union "designation or selected" by the "majority," and do not grant employers that absolute privilege (see pp. 5-15 *supra*)), amended in one particular and in a manner consistent with the proposition that prompt initiation of bargaining is the Act's overriding aim—the addition of § 9(c)(1)(B) permitting employers who have "reasonable grounds" for believing that a union is "really not the choice of the majority" (S. Rep. No. 105, *supra*) to file their own petition where the union does not do so.

§ 8(b)(7)(C), added in 1959 to regulate recognitional picketing, is necessary. (Cf. Bd. Br. pp. 24-25; Co. Br. pp. 9, 21.) (It is not even contended that the remaining 1959 amendments have any bearing on these cases.) The instant proceedings do arise in a context in which recognitional picketing took place, but, at no point has the legality of that picketing been in direct issue, since no charges against the Unions were filed, and, since, as already noted (pp. 3-5), the question of whether such picketing ever perfects the duty to bargain was pretermitted by the Board's adoption of its "absolute privilege" position which renders irrelevant an inquiry into the probative value of the particular means utilized to demonstrate majority status. Since under the Board's current practice there is no form of proof other than a union secured certification that requires an employer to bargain, that practice can not be justified by § 8(b)(7)(C).

But, even assuming *arguendo*, that § 8(b)(7) is implicated here

The upshot is that there can be no doubt that the error the Board has committed here is exactly the one for which it was reversed in *NLRB* v. *Drivers Local 639 (Curtis Bros.)*, 362 U.S. 274. In *Curtis Bros.* the Board took the position that the general language of § 8(b)(1), which prohibits restraint and coercion by unions, entitled it to ban peaceful organizational picketing. As this Court pointed out, 362 U.S. at 288-290:

> "[In 1947] the House passed a bill imposing drastic limitations upon the right to picket * * * [Section] 12(a)(2) * * * would have outlawed all picketing of 'an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employers.' And [§ 12(a)(3)(c)] would have banned picketing 'an object of which [was] (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 * * * or (iii)

it does not aid the Board. For, § 8(b)(7)(C) does not "reflect" a "Congressional objective" to "restrict" picketing of the type which took place here. (Cf. Bd. Br. p. 24) Prior to 1947 it was understood that the Act "expressly preserves the right to strike, section 13, U.S.C.A. § 163, and that includes a strike for refusing to negotiate as well as any other. It is a remedy parallel with recourse to the Labor Board." (***Remington Rand*, 94 F.2d at 871.**) In 1947, Congress refused to limit the right to engage in such picketing. (See *NLRB* v. *Drivers Local 637* (*Curtis Bros.*), 362 U.S. 274 discussed at pp. 22-24 *infra*.) Finally, since, as this Court has noted § 8(b)(7)(C) "establishes safeguards against the Board's interference with legitimate picketing activity" (*id.* at 291), the Board has held that the right "to strike and picket against an employer's unlawful refusal to recognize" is preserved. (NLRB Pet. App. p. 171 citing *Blinne Const. Co.*, 135 NLRB 1153;

> to compel an employer to violate any law * * *" HR 3020, 80th Cong., 1st Sess., 47-49. Plainly the Local's conduct in the instant case would have been prohibited if the House bill had become law.
>
> "But the House conferees abandoned the House bill in conference and accepted the Senate proposal. H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 42. They joined in a Conference Report which stated that 'the primary strike for recognition (without a Board certification) was not prohibited.' Id., at 43.
>
> "This history makes pertinent what the Court said in Local 1976, United Brotherhood of Carpenters & Join-

see also *Dayton Typographical Union* v. *NLRB*, 326 F.2d 634, 647-648 (C.A.D.C.).)

The objection of the court below that "Refusal to cross a picket line may reflect mere fear * * * Or it may reflect a respect for what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative," (N.L.R.B. Pet App. p. 44 n. 44), fails to come to grips with the fact that in these cases each of the employees decided for himself to join a walk-out to protest the Employers' refusals to bargain, and at the time of doing so none could be sure that he would at the decisive moment receive the support of his fellows. Each chose to run the risks inherent in taking his stand openly before his employer who had demonstrated opposition to dealing with his Union, and to incur the financial loss that goes with joining a strike. That is not the act of a summer soldier. We therefore continue to believe that, on this point, Judge Parker was right when he said:

> "The contention that the company was in doubt as to the union's representing a majority of employees is little short of absurd in view of the fact that practically all of the employees went out on strike in an attempt to compel the company to bargain with the union. N.L.R.B. v. National Seal Corp., 2 Cir., 127 F.2d 776, 777." (*NLRB* v. *Harris-Woodson Co.*, 179 F.2d 720, 723 (C.A.4).)

ers v. N.L.R.B., 357 U.S. 93, 99, 100: 'It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces * * * This is relevant in that it counsels wariness in finding by construction a broad policy * * * as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law.'"

So here. As we have demonstrated (pp. 15-22), while employers may continue to believe that they should have a privilege to refuse to bargain with unions that have not petitioned for and secured a Board certification, broader than the one Congress has granted, and while they succeeded in securing approval of their view by the House, they have been "unable, to secure its embodiment in enacted law." This being so, the Board has no power to write its policy preferences into the Act to nullify, in part or in whole, the obligation to recognize unions "designated or selected" by a "majority" (§§ 8(a)(5) & 9(a)) that Congress wrote into the Act.

To paraphrase Mr. Justice Harlan's language in *Local 1424 Machinists* v. *NLRB*, 362 U.S. 411, 418 n. 7, 428:

> "The legislative history of the 1947 Taft-Hartley amendments plainly shows, that [the Congressional decision to 'follow the provisions of existing [§ 8(a)(5) law (H. Conf. Rep. No. 510, supra, at p. 41) amended only by the addition of § 9(c)(1)(B)] represented the Congressional response to the competing demands of [the right of employees to have their employer bargain promptly when presented with a demand for recognition and the right of employers to require the

> union to secure a Board certification as a condition precedent to bargaining]. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate to approach either side of that line grudgingly."
>
> "It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The 'policy of the Act' is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. * * * It may be asserted, without fear of contradiction, that the interest in [insuring proper recourse to the Board's certification procedure] is one of those given large recognition by the Act as amended. But neither can one disregard the interest in 'industrial peace [by "encouraging the practice and procedure of collective bargaining"] which it is the overall purpose of the Act to secure.' As expositor of the national interest, Congress [concluded that it would not consider the first of these interests overriding where that delays the prompt initiation of bargaining.] 'It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy * * *."

3. The foregoing understanding of the Act, as it emerged in 1947 (and as it remains today), is confirmed by this Court's decision in *Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62. That case, like these, dealt with the obliga-

tion imposed by §§ 8(a)(5) & 9(a) upon an employer who had not committed other unfair labor practices, where a:

> "union, by February 24, 1954, held applications for membership from 174 of the 225 eligible employees. Such applicants had elected officers and stewards and had authorized the union organizer to request the company to recognize the union as their collective-bargaining representative. On February 24, the organizer, accordingly, presented that request to the assistant superintendent of the plant. The latter, in the absence of any higher officer of the company, replied that the union was not recognized either by the National Labor Relations Board or by him, and that, if negotiations were desired, the union organizer should call the company's office at Pine Bluff.
>
> "On March 1, the petitioning employees struck for recognition of the union and set up a peaceful picket line of three employees. Two were placed in front of the plant and one at the side. They carried signs stating 'This Plant is on Strike' or 'We want Recognition, District 50 UNWA.'" (351 U.S. at 66-67.)

The resulting legal proceedings commenced when the employer secured a state court injunction against the picketing. (The Board's processes were not available to the union because it had not complied with the then existing filing requirements of §§ 9(f)(g) & (h).) (*Id.* at 64-66, 69-71.) But, since the doctrine that all conduct "arguably prohibited or protected" is within the NLRB's exclusive primary jurisdiction (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236) had not yet been announced, the Court decided for itself the merits of the dispute:

> "The Labor Board is but an agency through which

> Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by applicable provisions and all courts, state as well as federal, are bound by them." (351 U.S. at 74.)

In so doing the Court stated:

> "In the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8(a)(5) of the Act.
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> • • • •
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> "Under [§§ 8(a)(5) & 9(a)] and by virtue of the conceded majority designation of the union, the employer is obligated to recognize the designated union." (*Id.* at 69, 75.)[13]

Mine Workers v. *Arkansas Oak Flooring* is cited with approval in this Court's more recent decision in *Gissel*, 395 U.S. at 597-598 (footnote omitted):

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[13] It is plain that the use of the word "conceded" meant that the facts in the record proved the majority, and not that the employer had stipulated that point:

> "Respondent also had sought the injunction on the alternative ground that the request for recognition of the union was being made in the absence of a selection of the union by the majority of respondent's employees. The Supreme Court of Louisiana did not pass upon this contention. The record upon which the temporary and the permanent injunctions were granted contained concededly genuine applications for union membership and authorizations of representation from 179 of the 225 eligible employees. Accordingly, we do not now consider the questions that would have been presented if the union or the pickets had represented less than a majority of the eligible employees, or if there had been a bona fide dispute as to the existence of authorization from a majority of the eligible employees." (*Id.* at 68 n. 2.)

"[I]n United Mine Workers, supra, we noted that a 'Board election is not the only method by which an employer may satisfy itself as to the union's majority status,' 351 U.S. at 72, n. 8., since § 9(a), 'which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen,' 351 U.S., at 71. We therefore pointed out in that case, where the union had obtained signed authorization cards from a majority of the employees, that '[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8(a)(5) of the Act.' 351 U.S., at 69. We see no reason to reject this approach to bargaining obligations now, and we find unpersuasive the Fourth Circuit's view that the 1947 Taft-Hartley amendments, enacted some nine years before our decision in United Mine Workers, supra, require us to disregard that case."

Whether the foregoing was a reaffirmation of *Mine Workers* v. *Arkansas Oak Flooring* or merely an acknowledgement of its holding, after *Gissel*, as before, *Arkansas Oak Flooring* is a square and authoritative precedent contra the Board's holding in these cases. (Certainly *Gissel* demonstrates that the Court of Appeals erred in treating *Arkansas Oak Flooring* as having "merely established that a state court could not enjoin a recognitional strike." (NLRB Pet. App. p. 42).) Yet the petitioners seek to glean from the *Gissel* opinion passages and intimations that this Court there endorsed what has since, in these cases, become the Board's current "absolute privilege" position.

They would draw from the *Gissel* opinion the rule that only "an employer [who] has committed independent unfair labor practices which have made the holding of a fair election unlikely" (cf. 395 U.S. at 610), is required to recognize a union that has not secured a Board certification. (Bd. Br. pp. 18-22; Co. Br. pp. 12-13.) The source of that asserted rule is the Court's holding:

"that the Board is not limited to a cease-and-desist order * * * where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside * * * but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. (*Id.* at 610.)

It is a logical absurdity to read a holding that an employer has a duty to bargain without an election under *some* circumstances (*viz*, when he commits serious unfair labor practices which make a fair election unlikely) into a holding that that is the *only* circumstance under which he has a duty to bargain without an election. That such illogic should be attributed to this Court is particularly ironic since the late Chief Justice took pains to specify what was and what was not being decided. In the opening sentence of his opinion for a unanimous Court he stated, "These cases involve the extent of an employer's duty under the National Labor Relations Act to recognize a union that bases its claim to representative status *solely on the possession of union authorization cards,* * * *." (395 U.S. at 579, emphasis added.) Thus, in terms of the analytical framework set out at pp. 3-5 of the introduction to our argument, *Gissel* did not focus on, or change the law (as exemplified in

Arkansas Oak Flooring) with respect to the first of the issues which we have defined. Rather, the Court provided a partial answer to the second question, namely that the Board does have power to require an employer to bargain without an election, if he has committed unfair labor practices which made a fair election unlikely.

In so doing the Court put "aside [for that case] the Union's arguments * * * [that the] right to rely on cards * * * should be * * * correspondingly more expanded than the Board would have us rule * * *," in order to consider "the points of difference between the employers and the Board," *viz*, whether cards can support a bargaining order where the employer does violate §§8(a)(1)-(4). (*Id.* at 594-595.) This made it unnecessary for the Court to pass on the merits of the Board's then current practice, insofar as that practice could be said to expand the privilege of employers to refuse to bargain. Nevertheless, petitioners rely on *Gissel* as support for the Board's present "absolute privilege" position which creates an even broader employer privilege than that which the Agency had advanced on oral argument in *Gissel*. There the Board had represented that:

> "When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, *unless he has knowledge independently of the cards that the union has a majority*, decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under §9(c)(1)(B)." (*Id.* at 591; emphasis added.)

In other words, at that time, the Board did not claim that employers who do not commit other unfair labor practices have an absolute privilege to refuse to bargain with a union that has not secured a Board certification, but only that such an employer has a privilege to deny "recognition immediately" in response to a union "demand based on possession of cards allegedly signed by a majority." As the court below recognized: "This is not just a matter of historical detail. Inherent in the [Board's change of] position is a difference which goes to the heart of the Congressional policy established by the statute." In contrast to its practice as described in *Gissel*, pursuant to which the Board would rely "on conduct by the employers or employees in drawing the inference that the employer must have known that the union had a majority," the Board's present view "means that even if an employer acts in total disregard of 'convincing evidence of majority status' he has no duty to recognize a union." (NLRB Pet. App. pp. 41-42.) Since the Court in *Gissel* did not even endorse the narrower position which the Board advanced at the *Gissel* argument, the petitioners are entirely unjustified in relying in these cases on what *Gissel* did decide.

The petitioners also seize upon the following portion of this Court's opinion in *Gissel*: "We emphasize that *under the Board's remedial power* there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." (395 U.S. at 615, emphasis added.) From this, the Board's brief argues that "If a bargaining order based on cards is not warranted even in some cases where the employer has committed inde-

pendent unfair labor practices, it would be anomalous to hold that one is nonetheless required where the employer has committed no unfair labor practices." (Bd. Br. p. 26; see also Co. Br. pp. 12-13.) But this argument, too, is based on a misunderstanding of *Gissel*. For, the language quoted was written in the context of the Court's determination of the question whether a bargaining order is an appropriate exercise of remedial power under § 10(c) where there have been violations of §§ 8(a)(1)-(4);[14] it did not reach, much less exhaust, the question of when or whether an employer has a substantive obligation to bargain with a union that has not secured a Board certification. That these are analytically distinct questions, and were treated as such in *Gissel*, is beyond controversy. For, the Board itself in an elaborate recent opinion (*Steel Fab. Inc.*, 212 NLRB No. 25, 86 LRRM 1474, 1475-1478) has made precisely the same point:

> "In effect, by issuing a [Gissel] bargaining order, we are remedying an employer's 8(a)(1) violations that have dissipated a union's majority and prevented the holding of a fair election. • • • In Gissel, the Court's decision approved the propriety of a bargaining order as a remedy for substantial non-8(a)(5) violations. The Court, recognizing the Board's authority to issue a bargaining order without finding a violation of Section 8(a)(5), stated, 'The Board . . .

[14] The Court stated the question it answered at 395 U.S. at 615, as follows:

> "[W]hether a bargaining order is an appropriate and authorized remedy where an employer rejects a card majority while at the same time committing unfair labor practices that tend to undermine the union's majority and make a fair election an unlikely possibility." (*Id.* U.S. at 579.)

> has long had a . . . policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.' N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575, 614 (1969).
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> • • • •
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> "The central issue in these cases is, as the Court's opinion in Gissel spells out, the propriety of the Board's use of a bargaining order as a remedy for varying degrees of employer unfair labor practices. We see no point in cluttering up the analysis of this central issue with the kinds of matters which we customarily consider in deciding whether an employer has or has not met the kinds of bargaining obligations dealt with in our typical refusal-to-bargain 8(a)(5) cases. Indeed it is our view, in hindsight, that if the Board, ab initio, had treated this as a purely remedial issue and had not interjected the superfluous 8(a)(5) finding, much confusion could have been avoided.
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> "As stated by Chairman Miller in United Packing, [187 NLRB 878, 880] it distorts our analysis to predicate bargaining orders on 8(a)(5) violations, and it is desirable for the Board to concentrate solely on a careful examination of the employers 8(a)(1) conduct and its impact upon the holding of a fair election. Henceforth, in these Gissel-type situations, we shall dispense with finding an 8(a)(5) violation and instead determine only whether or not a bargaining order is necessary to remedy the employer's 8(a)(1)'s."

The foregoing represents the views of the majority of the Board in *Steel Fab*—the same majority which decided the instant cases. The dissenter in *Steel Fab* objected that a decision to issue a bargaining order because of violations

of §§ 8(a)(1)-(4) does not remove the Board's obligation to consider whether the employer has also violated § 8(a)(5) and whether a bargaining order is required for that additional reason. (86 LRRM at 1478-1483.) The respective positions of the majority and the minority in *Steel Fab* are in harmony with their respective views in the present cases. For, the majority view in *Steel Fab*, like that in these cases, virtually eliminates § 8(a)(5) as an independent course of a duty to bargain with uncertified unions—a view which the minority does not accept. The significance of *Steel Fab* for present purposes is that the majority was there brought to recognize—contrary to intimations in its opinions in the present cases and the arguments of its counsel—that nothing in *Gissel* authorizes the *pro tanto* nullification of § 8(a)(5).

The petitioners also place great weight on the following passage, which introduces the *Gissel* Court's response to the "objections to the use of cards voiced by the employers and the Fourth Circuit:"

> "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support. The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered totally invalid, * * *" (395 U.S. at 602; see Bd. Br. p. 28; Co. Br. p. 8.)

The proposition that the Board's "election process" is "superior" to "cards" can not be transmuted into the Board's present position which mandates a union seeking recognition to petition for certification if an employer who

has not committed other unfair labor practices requires that course by refusing to accept *all* other methods of proving that the majority of the employees have in fact "designated or selected" that union as their representative.

The evaluation stated in *Gissel* is predicated on a comparison between two specific alternatives—authorization cards standing alone as contrasted with a Board election. One cannot validly generalize from the proposition that alternative A is superior to alternative B to the conclusion that A is superior to all other alternatives, especially where alternative B was assumed to be the least satisfactory among several alternatives. (See *Gissel*, 395 U.S. at 604-605.)

The Board itself has understood that its election procedure is not qualitatively superior to all the available possibilities. For example, the Board has ruled that it is lawful for an employer to determine the validity of a union's claim that it has been "designated or selected" by a majority, by polling those employees, so long as:

> "(1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere." (*Struksnes Const. Co.*, 165 NLRB 1062, 1063 cited with approval in *Gissel*, 395 U.S. at 609.)

And the Board continues to hold, as it has in the past, that where an employer "unilaterally undertakes to determine the Union's majority or minority status by means of poll,

under conditions of his own choosing," rather than requiring the union to petition for a certification, the employer "cannot thereafter disclaim the results simply because it finds them distasteful" without violating §8(a)(5), since "there can be no doubt concerning the employees' preference thus expressed." (*Sullivan Electric Co.*, 199 NLRB No. 97, 81 LRRM 1313, 1314-1315, enforced 479 F.2d 1270 (C.A. 6).)

Thus, the Board's present " 'voluntarist' view of the duty to bargain" (which permits an employer to refuse a request to bargain by a union which possesses authorization cards and proposes a *Struksnes* poll as a method for authenticating the cards in order to satisfy any employer doubt as to their accuracy) does not rest on reasoned objections to alternative means which have proved reliable over the years. Rather, that position rests on the view that the employer has an absolute privilege, the course of which is unspecified, to refuse to recognize a union that has not petitioned for and secured a Board certification which he can waive. But Congress has created no such *employer* privilege. (See pp. 5-25 *supra*.)

Congress has chosen not to grant employers that privilege because the benefits of prompt effectuation of the employees' §7 right "to bargain collectively through representatives of their own choosing," which is "the primary means fashioned by Congress for securing industrial peace" (*IUE* v. *NLRB*, 426 F.2d at 1249), outweigh the benefits which would be gained by freeing employers of the obligations imposed by §§8(a)(5) & 9(a), thereby requiring unions in every case to file their own certification petitions, a course

which entails "considerable delays" (*Gissel*, 395 U.S. at 595).

Where, to return to the example suggested by *Sullivan Elec. Co., supra*, a union presents authorization cards backed by an offer of a cross-check through an employer poll of the employees, the case for the superiority of a Board election, as a mirror of the employees' sentiments at the time of the demand, is attentuated in the extreme. It cannot be said that an election many weeks or months after the demand will provide a sounder indication of employee's "true" desires than the authorization cards, supported by a poll at the very time in question. (See pp. 35-36 *supra*.) As Professor Lesnick has noted, those who contend that a Board election is qualitatively superior to prompt informal means of proving a majority are guilty of:

> "* * * inappropriate romanticizing about employee free choice and its relevance to what actually goes on when employees are asked to vote for or against unionization * * * [E]mployees do not make choices about unionization for the same reasons, or in the same context, that they join veterans' organizations, political parties, churches, or bowling leagues * * * The fact is that we have a dual regime in our labor law: We attempt to insulate employees from economic pressure affecting **their decision whether or not to bargain collectively,** but we build our scheme of collective bargaining on the foundation of economic power. The governing principle, to adapt Professor Cox's happy aphorism to this context, is: 'To the lion belongs the lion's share.' We delude ourselves, however, when we begin to think of these compartments as watertight, and the election campaign is the spot at which the point of leakage is

to be found. The lawful coercion of collective bargaining must affect the intended free choice of the voters in a Labor Board election * * * But a 'free' choice connotes one protected from coercive pressures, not merely one fully informed of them, and it makes a mockery of the notion of free choice to invoke it as the interest which clamors for expression via an employer anti-union campaign [prior to an election]." (Lesnick, *Establishment of Bargaining Rights Without an Election,* 65 Mich. L. Rev. 851, 865, 866-867; see also *Gissel,* 395 U.S. at 603-604.)[15]

Requiring unions in every case to secure a Board certification can not therefore be defended on the ground that it is the only method assuring accurate measurement of employee desire for collective bargaining. And, there can be no doubt that the absolute privilege the Board has granted employers undermines the proper administration of the Act. We have already noted (pp. 8-9 n. 8 and pp. 12-13) the Board's recognition in *Ex-Cell-O,* 185 NLRB at 108, that an employer who exhausts the full panoply of procedures provided in a representation case secures a "delay of 2 or more years in the fulfillment of a statutory bargaining obligation," and the basic truth that "Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining," (*IUE* v. *NLRB,* 426 F.2d at 1249). At this juncture we would only add the insight the court below stated in the *IUE* case that is fully applicable here:

[15] To the points made by the Court in *Gissel* we would add that because of the continuing nature of their relationship the employer also has the opportunity to get his message to the employees prior to the time the union ever appears on the scene.

"Not only furtherance of national labor policy but also important considerations of judicial administration are involved. Simply put, the present posture of the Board encourages frivolous litigation not only before the Board, but in the reviewing courts. The case at hand is in point. The position of the Company is palpably without merit with respect to its refusal to bargain. Yet it profited through the delay that review entails: all during this litigation it has not had to bargain collectively over wages or other financial aspects of employment.

"The courts, then, are doubly concerned when Board inadequacies drain and divert judicial resources from the provision of justice to the crowded calendars and to meritorious litigants whose claims clamor for attention. The same considerations are presumably applicable at the administrative level." (426 F.2d at 1249-1250.)

The Board's brief (Bd. Br. pp. 23-24) protests that the interest in avoiding delay cuts in its favor. It argues that pursuant to its present position:

"an election can be held expeditiously. The Board's present position encourages the resolution of representation questions by this salutary means. * * * Unfair labor practice proceedings, particularly where the validity of each card is contested, are generally far more protracted than representation proceedings."

But the figures the Board cites were apparently selected so as to mislead in that they compare the time necessary for a "regional director [to] direct an election" which is not the culmination of a representation case (since there remains the election itself, a right to file objections with the regional director and a right to petition for Board

review) with the time necessary to process an unfair labor practice case to final "Board decision". And, the Board commits even more fundamental errors. The fancy that an employer who refuses to accept any alternative for ascertaining a union's majority status other than a union petition for a certification will, upon the filing of that petition, endeavor to expedite a Board election, and promptly accept the result, is extraordinarily naive. Such an employer's demand for that one method of proof can not be said to demonstrate a desire to allay "reasonable grounds" for believing that the union is "really not the choice of the majority" (cf. S. Rep. No. 105, *supra*); it can only be viewed as an effort to secure delay for its own considerable value. The representation process is not, as the Board seeks to imply, an alternative to litigation through an unfair labor practice case; it is merely a first stage of litigation antecedent to an unfair labor practice case. After an election the employer is free of sanctions until a subsequent § 8(a)(5) proceeding has run its course. (*Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146; *Magnesium Castings Co.* v. *NLRB*, 401 U.S. 137.) As Member Fanning stated, dissenting from the second supplemental decision in *Wilder:*

> "[T]he holding in *Linden Lumber* and in [*Wilder*] permits employers who are unwilling to engage in collective bargaining * * * to take advantage of the [election] procedures for purposes of delay * * * Should that election result in a union victory, they may still refuse to bargain to test the certification in an unfair labor practice proceeding. In either event, the bargaining obligation will be imposed on them after long months, even years, of delay when the union's strength has been dissipated by attrition and

> discouragement. Admittedly, not all employers seek to utilize the election procedures for purposes of obstruction and delay. * * * But our rules must be tailored to the "unwilling employers" as well as to the cooperative employer and the rule applied in this case permits employers, such as the respondent in *Linden Lumber* * * * to declare their intention to disregard any certification that might come out of an election, and still escape a bargaining order because the union did not file a petition. Such a rule encourages recalcitrance on the part of employers without any corresponding furtherance of any other policy embedded in our labor laws." (N.L.R.B. Pet. App. pp. 192-193.)

The Board's brief not only misstates the nature of the relationship between its representation procedures and unfair labor practice proceedings, it ignores the point that the Board's present position removes all incentive for employer acceptance either of private methods for the resolution of representation questions (including those utilizing procedures the Agency itself recognizes are reliable such as a cross-check of cards through an employer poll), or, of Board consent election agreements, which are certainly reliable. Yet, these are preferable to union initiated representation cases since the latter is the most protracted method for resolving representation questions. (See pp. 8-9 n. 8 *supra*.) Employers, of course, normally consider the "avoidance of bargaining * * * an economic benefit." (*IUE* v. *NLRB*, 426 F.2d at 1249.) The only rational expectation is, therefore, that since it maximizes delay employers will take full advantage of the Board's current practice which frees them from the obligation to recognize a union that has not secured a Board certification. One

can not expect employers to assume an obligation that "encourage[s] the practice and procedure of collective bargaining" unless it is imposed by law. That is why the Wagner Act was necessary in the first place. But our legal system does rest on the proposition that a substantial portion of those regulated by a statute will respect the duties imposed upon them without the necessity of coercive sanctions. This case is not about the comparative merits of contested representation cases as against contested unfair labor practices cases. The major consequence of the outcome will be whether the law will encourage protracted litigation or whether it will encourage utilization of less expensive and time consuming procedures for initiating collective bargaining. In terms of pure policy, the only terms which the Board has addressed, the ultimate indictment of the Board's current "absolute privilege" position is that it rewards employer recalcitrance.[16]

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[16] Compare NLRB Press Release dated July 1, 1974:

"NLRB ISSUES RECORD NUMBER OF DECISIONS

"The National Labor Relations Board broke all records during fiscal 1974 in deciding cases under the nation's primary labor relations law.

• • • •

"The five-Member Board handed down 977 decisions in contested unfair labor practice cases brought before it by individuals, employers, and unions. Additionally there were 543 rulings by the Board in employee representation election cases. Each total was a record, and the combined figure was 100 decisions more than the previous mark of 1,420 decisions in unfair labor practice and representation cases set last year.

• • • •

" 'We continue to be faced with a growing caseload,' said Chairman Miller. 'We have somehow managed to keep pace with it. This five-man Board, aided by staffs which have had almost no increases in personnel since I became Chairman four years ago, has coped with an approximate 25% rise in cases over that period. I am, frankly, surprised that we have been able to cope this well, and I have genuine doubts we can do it much longer without Congressional action to modernize our almost 40-year-old, antiquated, decision-making structure.' "

The false argument built upon *Gissel* that pervades the Board's brief, and to which we reply last, is the contention that the position the Board adopted in these cases is necessary to avoid "the tangled thicket of subjective motivations" (Bd. Br. p. 21). Reliance is placed on *Gissel* approval of the Board's abandonment of a subjective good faith test for determining whether employer unfair labor practices justify a bargaining order. (Bd. Br. pp. 19-20.) We need not reiterate our objection that what this Court said in one context is not necessarily applicable in another context. Nor will we dwell on the point that *Gissel* did not permit the Board to dilute the employer obligation there stated as it had been previously understood, but rather, simply permitted the Board to strip away a veneer of subjective motivation in order to reveal the objective criteria which had actually controlled the decision making process all along. That reform, of course, was warranted in light of the criticisms that had been leveled at the Board's failure to provide a satisfying rationale for issuing bargaining orders on the strength of subsequent other unfair labor practices. (Cf. Bd. Br. pp. 17-18 n. 16.) But those criticisms were not leveled at the precedents upon which we rely. For the obligation they state is derived directly from §§ 8(a)(5) & 9(a) and not, as in a *Gissel*-type case from § 10(c). And

here, the Board's method of abandoning its good faith test does not clarify the prior law, it replaces an obligation explicitly stated in the Act with an absolute privilege nowhere to be found in the statute.

For, it is a sufficient answer that we are not suggesting that any subjective test be applied by the Board. Indeed, as we have pointed out (pp. 5-15), the pre-1947 precedents, which Congress preserved in 1947, rested on largely objective criteria. It is our position that the Board not only has the power but the duty to establish objective criteria for determining when an employer who has not committed unfair labor practices must bargain with the union. What its criteria shall be is the second issue which we identified at the outset of this brief and which we have insisted throughout is not here. It is precisely because we believe that it is the Board's duty in the first instance to develop these criteria that we did not cross petition in this Court for review of so much of the Court of Appeals judgment as denied a bargaining order at this time. As Mr. Justice Frankfurter stated in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 where the Board challenged a Court of Appeals decision on the ground that to "apply the abstractly just doctrine" decreed "would put on the Board details too burdensome for effective administration" (*id* at 198):

> "Simplicity of administration is thus the justification for [the Board's position] • • • But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its adminnistrative resourcefulness." (*Id.*)

A fortiori the Board can not escape its duty by adopting a rigid rule of law which Congress distinctly rejected in 1947. Indeed, even if the Board were to deny the ability to formulate objective criteria this Court would not accept its disclaimer. (Compare *NLRB* v. *Radio and Television Broadcast Engineers*, 364 U.S. 573, 582-583.)

• • • •

One final word is necessary. Addressing itself to what the Court of Appeals said on the issue not presented here of the privileges and obligations of an employer who files his own §9(c)(1)(B) petition (see pp. 16-19 *supra*), the Board's brief responds:

> "[I]f Congress had intended to impose the requirement that the employer must file a petition for an election in order to avoid violation of Section 8(a)(5), it seems reasonable to suppose that it would have said so. Neither the language of the Act nor its history reflects any such intention." (Bd. Br. p. 30.)

Whether or not the Court of Appeals was correct (and we believe it was wrong) in drawing from Congress' decision to enable employers to file such petitions, a privilege to refuse to recognize a union that has presented "convincing evidence of majority support" (see pp. 5-15), on the issue that is before the Court the shoe is on the other foot. "Congress" *has* "said," explicitly that "it is an unfair labor practice for an employer to refuse to bargain collectively with the representative • • • designated or selected • • • by the majority of the employees in a[n] • • • appropriate • • • unit," (§§8(a)(5) & 9(a)). And, it retained that

statutory language after it had been established that, as those words plainly signify, §§ 8(a)(5) & 9(a) do impose on employers (whether or not they have committed other unfair labor practices) an obligation to bargain with a union that has not petitioned for and secured a Board's certification, and do not, as the Board held here, grant an absolute privilege to refuse to do so. "[I]f Congress had intended to [grant that privilege] it seems reasonable to suppose that it would have said so."

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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